APPENDIX "A".

Opinion of the Supreme Court.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Appellant, v. David Noroff et al., Defendants and Respondents. Crim. 11200.

Filed Nov. 21, 1967.

Defendants were charged in the Municipal Court of the Los Angeles Judicial District with a violation of Penal Code section 311.2, which proscribes the possession of obscene matter for distribution in this state.[1] In chambers, the trial court examined the challenged material, a single copy of a magazine entitled "International Nudist Sun, Vol. 1, No. 5" (hereinafter referred to as "INS #5"). The court ruled that the magazine fell within the constitutional protection of the First and Fourteenth Amendments of the United States Constitution; concluded that it was not "obscene"[2] within the meaning of Penal Code section 311, subdivision (a); and ordered the case dismissed. On appeal by the People, the Appellate Department of the Superior Court of Los Angeles County affirmed

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[1]Section 311.2 provides: "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

[2]Penal Cde section 311 provides in part: "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance. . . ."

and then certified the case to the Court of Appeal which granted a transfer. After reversal by the Court of Appeal, we granted a hearing.

The People initially charged that INS #5 was obscene on its face. Unlike Ginzburg v. United States (1966) 383 U.S. 463, this *is not* a case in which "the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." (*Id.*, at 465.) On the contrary, the prosecution expressly recognized that the only issue relevant to its charge was the obscenity of the magazine per se.

We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's "pandering" of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime.[3] Insofar as dictum in Landau v. Fording (1966) 245 Cal.App. 2d 820, 824, 830, affd. per curiam (1967) 387 U.S. ....., suggests a contrary reading of the California statutes, it is hereby disapproved.[4]

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[3]Earlier this year, the Attorney General advocated the amendment of the Penal Code to prohibit the offense of "pandering"—"the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers" (Ginzburg v. United States, supra, 383 U.S. at 467). (See A Report to the California Legislature on Obscenity: the Law and the Nature of the Business (April 6, 1967) 13-16.) To date, no such amendment has been enacted.

[4]We hve held that Penal Code section 311.2 does not apply to "matter produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique" (In re Klor (1966) 64 Cal.2d 816, 820). Given the decision in Griswold v. Connecticut (1965) 381 U.S. 479 (cited

Since there can thus be no doubt that the trial court properly proceeded to determine from its own examination of INS #5 whether or not the magazine itself was obscene in the constitutional sense (Zeitlin v. Arnebergh (1963) 59 Cal.2d 901, 904, 908-911; see also Jacobellis v. Ohio (1964) 378 U.S. 184, 190 fn. 6; New York Times Co. v. Sullivan (1964) 376 U.S. 254, 285), the only question properly before us is whether the trial court committed error in deciding that INS #5 was constitutionally protected. We uphold the trial court's determination and conclude that INS #5 is not obscene.

We turn at once to the magazine itself. Its text, illustrated by numerous photographs of naked adults, proclaims the supposed virtues of nudism as a "pattern of life." One could hardly suggest that the articles in the magazine are provocative or even in bad taste.[5]

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in *Klor* at 820), we recognized that the interest in regulating the dissemination of obscene material neither requires nor permits intrusion into the essentially private zone of personal use. In this sense alone, "the central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than upon the allegedly obscene nature of the material." (In re Klor, supra, 64 Cal.2d at 821.) Nothing in *Klor*, of course, suggested the adoption of a "pandering" concept similar to that elaborated in *Ginzburg* in the context of the federal obscenity statute.

[5]We quote here a few typical passages:

"Nudism is . . . a movement of individuals who are personally convinced of its rightness. Within each nudist there is a strong conviction that the pattern of life he seeks to live is not only right in the eyes of God and the just, but more so than the conventional mode of life. . . .

"One of our most popular sports in summer is swimming for which millions of suits are sold each year to accommodate the swimmers. The suits, however, are not only unnecessary to the enjoyment of swimming but are actually an annoyance. . . . Medical opinion suggests that if one wishes to lounge on the beach, he should do so before entering the water, because if the bather takes a dip and then does his loafing he is creating a very suit-

(This footnote is continued on the next page)

The publication admittedly makes no effort to conceal either male or female genitals, and several of the poses seem contrived to preserve genital exposure at the expense of aesthetic considerations. Most of the pictures, however, depict entirely innocuous outdoor activities at a nudist colony or sunbathing camp; none of the photographs displays any form of *sexual activity.*[6] *Viewed as a whole* (Roth v. United States, supra, 354 U.S. at 489), the work is in no sense calculated to stimulate a predominantly sexual response. On the contrary, the static and wooden quality which prevents INS #5 from rising to the level of art simultaneously lifts it above the level of pornography. In the words of Penal Code

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able abode for fungus organisms in the area kept moist by his suit. Yet we all spend considerable amounts of money in order to wear bathing suits. All this suggests that there are times when clothes are not only undesirable, but even detrimental. However, if these were the only considerations there would probably be no nudists. It takes positive advances to induce people to make changes. . . ."

[6]The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications invoved in Ginzburg v. United States, supra, 383 U.S. 463, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of "*animating* sensual detail to give the publication a salacious cast. . . ." (Italics added.) (*Id.*, at 471.) The materials at issue in Mishkin v. New York (1966) 383 U.S. 502, portrayed "sexuality in many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality. Many [had] covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. . . ." (*Id.*, at 505.) Finally, the film central to the litigation in Landau v. Fording, supra, 387 U.S. ...., "explicitly and vividly revealed acts of masturbation, oral copulation, . . . sadism, masochism and sex" (245 Cal.App.2d 820, 822, affd. per curiam, 387 U.S. ....). Such materials, and no others, have been thought to constitute "hard-core pornography." (See the dissenting opinion of Stewart, J., in Ginzburg v. United States, supra, 383 U.S. at 499; see also Magrath, *The Obscenity Cases: Grapes of Roth.* The 1966 Supreme Court Review 7, at 71.)

section 311, we do not find that, "Taken as a whole," the "predominant appeal" of the magazine, including its depiction of nude adults, though revealing, "is to prurient interest, i.e., a *shameful* or *morbid* interest in nudity . . . which goes substantially beyond the customary limits of candor." (Italics added.)

Since the "dominant theme of the material taken as a whole" does not appeal to "a prurient interest in sex," INS #5 could not be deemed obscene even if it were "patently offensive" and "utterly without redeeming social value." (Memoirs v. Massachusetts (1966) 383 U.S. 413, 418.) We need not explore these issues at greater length, however, since the question before us is not truly an open one. In Manual Enterprises v. Day (1962) 370 U.S. 478, and in Sunshine Book Co. v. Summerfield (1958) 355 U.S. 372 (per curiam),[7] the Supreme Court summarily reversed obscenity convictions involving magazines more crudely explicit[8]

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[7]For a discussion of the per curiam decision in the Sunshine Book case, see Zeitlin v. Arnebergh, supra, 59 Cal.2d at 915-916, fns. 22-24; Lockhart and McClure, *Censorship of Obscenity; The Developing Constitutional Standards* (1960) 45 Minn.L.Rev. 5, 32-35.

[8]The District Court in Sunshine Book Co. v. Summerfield (D.D.C. 1955) 128 F.Supp. 564, 571, thus described one of the photographs which it thought particularly obscene: "The man . . . is standing [next to a woman] with a side view. By artful use of shadow his face is completely obliterated, his entire pubic area is obliterated by the shadow, but prominently shown in front of the pubic area and against this dark background is his male organ; the corona of the penis is clearly discernible in fact, even casual observation of it indicates that the man is circumcized. This obviously has no place even in illustrating the principles of nudism." The rest of the challenged magazine likewise contained "photographs of naked men, women and children—principally women—clearly revealing genitals, breasts and other portions of the body normally covered in public." (*Id.*, at 573.)

The magazines which the court held non-obscene in Manual Enterprises v. Day, supra, 370 U.S 478, consisted "almost en-

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and certainly more vulgar[9] than INS #5. On June 12, 1967, the court reaffirmed these holdings by reversing, on the authority of *Sunshine Book Co.,* a Virginia judgment involving similar material. (Rosenbloom v. Virginia (1967) 387 U.S. .... (per curiam).) Even more recently, the United States Supreme Court has reversed decisions of the federal circuit courts which held that magazines containing pictures of nude males and females focusing on the genitalia were obscene. Indeed, one of the magazines there involved is the same as that which is now before us ("International Nudist Sun"), although we deal with a different issue of it. (Central Magazine Sales, Ltd. v. United States (1967) .... U.S. .... [36 U.S.L.Week 3170], reversing per curiam United States v. 392 Copies of Magazine Entitled

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tirely of photographs of young men in nude or practically nude poses handled in such a manner as to focus attention on their genitals or buttocks or to emphasize these parts. . . ." (Clark, J., dissenting, at 526-527.) "[S]ome [of the pictures] showed . . . pubic hair and others suggested what appeared to be a semi-erected penis. . .; others showed male models reclining with their legs . . . spread wide apart. . . ." (370 U.S. at 490, fn. 13.) The court's "own independent examination of the magazines" led it "to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' " (Id., at 489-490.) Only Justice Clark dissented.

[9]The District Court in the *Sunshine Book* case, for example, provided a detailed description of a photograph of an "exceedingly: sends or causes to be sent, or brings or causes to be brought, from her shoulder to her waist." In the court's words, the pubic "hair extends outwardly virtually to the hip bone [and] the hair line instead of being straight is . . . scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy. . . ." (128 F.Supp. at 572.) In another picture, "the pubic hair is matted; the overall effect] is one of vulgarity, filth, obscenity and dirt." (*Ibid.*) Although another photograph displayed the labia majora, the court thought them "diminutive and juvenile" and therefore "not obscene." (*Id.*, at 571.)

"Exclusive" (4th Cir. 1967) 373 F.2d 633; Potomac News Co. v. United States (1967) ....U.S. .... [36 U.S. L.Week 3170], reversing per curiam United States v. 516 Cartons Containing 19,500 Copies of Mag. (4th Cir. 1967) 373 F.2d 635.)

Having examined INS #5 in light of these decisions, we can reach only one conclusion: Given the materials to which the Supreme Court has accorded constitutional protection, we cannot withhold such protection here. Accordingly, we must sustain the trial court's ruling that the magazine is not obscene.

The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tadry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote.

Yet this court is bound, of course, by the decisions of the United States Supreme Court. That court has imposed its prohibitions only at the outer limits of the area of publication, eaving to the public the taste of voluntarily casting out the offensive. That court has held that the representation of the nude human form in a non-sexual context is not obscene. The Supreme Court has decided that the judiciary cannot engage in the task of placing legal fig leaves upon variegated presentations of the human figure. That court has told us

that no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene. In the materials before us we find some of the poses of the subjects to be inexcusably repulsive, and we trust that a discerning public will discard and reject them. But the decisions of the United States Supreme Court tell us that the task of rejection lies not with us but with the public.

The judgment is affirmed.

Tobriner, *J.*

We Concur:

Traynor, *C. J.*
McComb, *J.*
Peters, *J.*
Mosk, *J.*
Sullivan, *J.*

Dissenting Opinion by Burke, J.

I dissent. The pseudo-nudist cult magazine, which is the subject of this action, flagrantly fails to pass any one of the tests adopted by the United States Supreme Court and more recently incorporated in the laws of this state by the Legislature.

Taken as a whole, the predominant appeal is to prurient interest which goes substantially beyond customary limits of candor and the magazine is utterly without redeeming social importance. According to small print at the bottom of the cover it purports to be "an educational, cultural, and scientific publication, for the advancement of nudism," and briefly included among its pages of pictures is editorial material replete with pious platitudes about the beneficial aspects of sunbathing and the freedom and relaxation to be gained by families' participation in outdoor games and activities.[1] But the statement of such a purpose and the inclusion of such material belie its all too obvious purpose of appealing to prurient interest. The pages of this magazine contain no pictures of families engaging in outdoor games and activities. In fact, no chil-

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[1]To be more specific, the format of the magazine, which terms itself "Collectors Issue," is this:

It contains 64 pages measuring 8½ inches by 11 inches. On both front and back covers are photographs of nude adults with genitalia concealed by prominent white pasted-on patches.

On the inside pages there is a total of *78* pictures, all of nude adults. In *74* of such pictures the genitalia are emphasized.

Such textual material as appears is arranged in columns, and each page of the magazine contains sufficient space for two full columns 9½ inches long, plus wide side margins. Thus the 60 inside pages (omitting outside and inside of front and back cover pages) will accommodate 1,140 inches of text. The text which the magazine contains actually adds up to 85 inches, measuring generously. The other 1,055 inches of space are devoted to the 78 pictures described above.

dren are portrayed, and the only suggestion of games is the inclusion of studio props which, like the text employed, are clearly designed as window dressing. The price of the magazine, $4.00, and the warning on its cover, "For Adults Only," are also indicative of what is the real purpose and interest of its purveyors. Sensual detail in the pictures is emphasized to a degree beyond contemporary or customary limits of candor, and the prurient emphasis on genitalia (often purposely denuded of all natural cover) belies the purveyors' purported interest in advancing the virtues of nudism.

Despite the ever-increasing evidence of declining moral standards, often expressed in terms of freedom from prudery, there are countless thousands of families in these United States striving to raise their children with a sense of morality and decency. The courts constitute the last bastion to which these families can look to save them from being engulfed by a flood of pornographic material. Conceivably, neither the Legislature nor the courts can reverse the unfortunate trend, but we can establish and apply rational limits. This our state Legislature has done in adopting the definition of obscenity as set forth in the recent United States Supreme Court decisions. If, as here, "redeeming social importance" can be ascribed to this obscene publication by the mere injection of scanty editorial material unrelated to the predominant purpose, then truly justice is blind.

I would reverse the judgment,

Burke, J.

APPENDIX "B".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Appellant, vs. David Noroff, et al., Defendants and Respondents. 2nd Crim. No. 13056.

Filed, Apr. 13, 1967.

On certification from the Appellate Department of the Superior Court of Los Angeles County. Judgments of dismissal reversed.

Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, and Michael T. Sauer, Deputy City Attorney for Appellant.

Gerald J. Levie, and Herald Price Fahringer, of counsel, for Respondents.

These criminal proceedings were instituted by the filing of complaints in the Municipal Court for the Los Angeles Judicial District charging each of the defendants with the violation of section 311.2 of the Penal Code.[1]

The complaint against defendant Noroff alleges that on January 29, 1966, he "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, ex-

[1]Penal Code, section 311.2, reads: "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

hibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: A MAGAZINE I N S INTERNATIONAL NUDIST SUN Vol. 1 No. 5." The complaint against defendant Mag's Incorporated alleges that it committed the same misdemeanor with respect to the same magazine on February 7, 1966. Both complaints are substantially in the language of section 311.2 of the Penal Code.

Defendants filed demurrers to these complaints on the stated ground, among others, that "The Complaints fail to state a public offense in that the magazine therein, entitled *International Nudist Sun,* Vol. 2 No. 5, is protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution and Article I, §9 of the California Constitution." These demurrers were heard and overruled.

The minutes of the trial court show that when the cases were subsequently called for trial in another division of the court, a "Motion of defendants to dismiss on constitutional grounds [was] made in chambers out of presence of Jury." At the conclusion of the arguments, and after reviewing the magazine, the court ruled, to quote from the transcript, "as a matter of law that said magazine is not obscene within the Penal Code definition of obscenity," and ordered each case dismissed.

The People appealed to the appellate department of the superior court on the grounds set forth in the settled statements: "1) The trial court committed prejudicial and reversible error in dismissing the action before defendants had been placed in jeopardy on the

ground stated, or on any other ground. 2) The magazine — INS International Nudist Sun, Vol. 1, No. 5 —is obscene and is not constitutionally protected. 3) The right of the People to have a jury determination of the question of obscenity."

The majority opinion of the appellate department held that defendants' motions to dismiss were properly granted upon the basis of the trial court's conclusion that the magazine in question "is within the ambit of constitutional protection, presumably meaning the First and Fourteenth Amendments of the federal Constitution and Article I, section 9, of the California Constitution."

With further reference to the basis of the trial court's judgment, the majority opinion of the appellate department states as follows in a footnote: "No specification as to the precise constitutional provisions invoked by either court or counsel appears in the record. The trial judge in ruling upon the motions stated 'the Court rules as a matter of law that said magazine is not obscene within the Penal Code definition of obscenity.' The settled statement on page 2 reads in relevant part, 'Judge Smith ruled that the magazine, INS International Nudist Sun, Vol. I, No. 5, was constitutionally protected and therefore not obscene within the definition of Penal Code 311(a).' We shall treat the ruling to be that the magazine was constitutionally protected under the constitutional provisions cited above as interpreted by *Roth v. U.S.* (1957) 354 U.S. 476 [1 L.ed. 2d 1498] and subsequent related cases and *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901."

The magazine in question was accurately described as follows in the dissenting decision of Judge Breiten-

bach: "The magazine consists of thirty-two pages, including the covers and contains sixty-two photographs, mostly in color, of eighty-three nude persons, twenty-seven of whom are men, and fifty-six of whom are women.

"On each of fourteen pages there appears a very small portion of the text of two articles. One is entitled 'Fundamental Philosophy,' and the other 'Virtue of Nudism.' Both articles consist of inane platitudes, utterly devoid of any real sense, and utterly without any social significance or importance whatever. . . .

"The publication does not depict the normal family activities at a nudist colony or sun-bathing camp. The emphasis throughout is upon the male, and more particularly, the female, genitalia, both shaved and unshaved. It is not merely another 'girlie' or 'nudist' magazine. . . . The settings themselves, some outdoors and crudely bucolic, and many others indoors and strangely artificial, are largely incompatible with the photographs which they background.

"The photographs depict men and women, both individually and together. Some are holding hands, while others are holding each other, and still others are dallying and gamboling on the green.

"These pictures were obviously posed to invite particular attention to the pubic hairs and the sexual organs for the deliberate purpose of arousing sexual passion. Nearly all are seductively and suggestively posed in such a manner as to appeal solely to the prurient interest. Emphasis throughout the magazine is upon the lewd and enticing positions and postures of the women, upon the fact that the pubic area are both bare, and fully exposed, and upon the fact that the

poses and the poseurs over-accentuate their pubic areas and their genitalia. Several of the women are lying flat on their backs. Some are lying on their backs with their arms and legs fully spread-eagled, obviously for the purpose of appealing to prurient interest. Genitalia are prominently and flagrantly displayed. Primary and secondary sex organis are patently and offensively exhibited. Nothing is left to the imagination. . . . Thus, for example, in several pictures the pubic hairs of the female mons Veneris appear to have been freshly shaved." To this description we add the further observation that the focal aim of the camera in the great majority of instances is directed at the region of the genitalia, which, rather than being an incidental part of the picture, have been made the center of attention.

The appellate department certified the case to this court by an order stating: "The constitutional issue is whether the magazine 'INS International Nudist Sun, Vol. I, No. 5' is obscene within the meaning of Penal Code, Section 311 (a) and hence without the constitutional protection of the First and Fourteenth Amendments of the United States Constitution and of Article I, section 9 of the California Constitution, when the issue is presented by the prosecution upon the basis of the material itself without any other evidence whatsoever."

As we viewed the case at the time we accepted certification, and as we view it now, the determinative question presented for our decision is as follows:

Did the trial court err in deciding the issue as to the obscenity of the magazine here involved as a pure issue of law on defendants' pretrial motion to dismiss

and solely on the basis of the court's examination of the magazine?

We hold that this question must be answered in the affirmative. The ruling of the trial court erroneously deprived the People of their right to a jury trial on the issue of obscenity and of their further right to introduce competent evidence relevant to the issues tendered by the complaints and the defendants' pleas of not guilty.

In *Zeitlin v. Arnebergh,* 59 Cal.2d 901, our Supreme Court made a thorough and extensive analysis of the then precedent decisions of the United States Supreme Court and of numerous other federal and state courts dealing with this subject matter. On the basis of that analysis the court stated the tests to be applied in determining whether or not any given item of questioned material "lies outside the protective embrace of the First Amendment." (P. 918).

In *Zeitlin* the court traced the legislative history of section 211 of our Penal Code and observed that the Legislature had "patterned its definition of obscenity upon that set forth in the American Law Institute's Model Penal Code (§ 207.10), portions of which had been approved as constitutionally permissible standards by the United States Supreme Court in *Roth v. United States* (1957), *supra,* 354 U.S. 476." (p. 911).

Our statutory definition thus sanctioned is as follows:

" 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or

excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Pen. Code, § 311, subd. a.)

That the foregoing statutory definition is consistent with constitutional requirements is further indicated by the following language of Mr. Justice Brennan in *A Book v. Attorney General,* 383 U.S. 413, 16 L.Ed.2d 1, 5-6:

"We defined obscenity in Roth in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S. at 489, 1 L ed 2d at 1509. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Recent decisions of the United States Supreme Court make it clear that although the reviewing courts are not bound by the finding of the trier of the facts that a given publication "lies outside the protective embrace" of the applicable constitutional provisions, nevertheless the trier of the facts should first determine all issues bearing upon the guilt of the defendant, including the issue as to the obscenity of the material viewed in the factual context of the case as developed by the evidence. (*A Book v. Attorney General, supra,* 383 U.S. 413.) In making its determination "the reviewing court must

make an *independent examination* of the whole record." (*Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 909.)

"The question whether a particular book or magazine is within the protection of the First Amendment requires a delicate constitutional judgment. This is not a judgment that can be made at a high level of abstraction. An independent evaluation must be made of the facts of each case." (*United States v. Luros,* 243 F.Supp. 160, 166.)

The impropriety of the action of the trial court in undertaking to decide the instant case on the basis of its examination of the magazine alone is made even clearer by more recent decisions of the United States Supreme Court. As stated by Chief Justice Warren in his concurring opinion in *Roth v. United States,* 354 U.S. 476, 495:

"The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. *But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture.* The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (Emphasis added.)

In *Ginzburg v. United States,* 383 U.S. 463, 16 L.Ed.2d 31, the defendants were convicted of using the

mails to distribute obscene literature. In affirming the convictions the United States Supreme Court assumed, without deciding, that the publications, standing alone, might not be held obscene. The court held, however, that the evidence relating to the merits of the publication, coupled with evidence as to the manner in which the material had been advertised and exploited, was sufficient to support the judgment. The following are excerpts from the majority opinion:

"Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" (P. 36)

"This evidence, in our view, was relevant in determining the ultimate question of 'obscenity' and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications, as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a

spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test." (P. 38)

Essentially the same approach was adopted by our Supreme Court in *In re Klor,* 64 Cal.2d 816, 821, wherein it was stated: "[T]he central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than upon the allegedly obscene nature of the material. [Citation.] No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him."

These expressions find support in the Comments of the draftsmen of the American Law Institute's Model Penal Code Tentative Draft No. 6 that has been consistently cited by our highest state and federal courts and whose definition of obscenity was the pattern used by our Legislature in enacting our present penal statutes on the subject. (*Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 911.) Among the apposite postulates enunciated in these Comments are the following:

"'[A]ppeal to prurient interest' refers to qualities of the material itself; the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives

and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior. *The principal objective of [obscenity legislation] is to prevent commercial exploitation of this psycho-sexual tension.*" (Emphasis added.) (P. 10) "The gist of the offense we envisage, therefore, is a kind of 'pandering'." (P. 14)

In sum, although the ultimate constitutional fact in issue remains a question of law to be decided by the court, it will be a rare case, particularly when pictorial material is involved, when a trial court may properly undertake to determine this issue prior to trial by exmere examination of the material itself unaided by expert testimony or evidence relating to the conduct of defendant in connection with the material. In *Landau v. Fording,* 245 A.C.A. 872, 876-877, the court disposed of the contention that "the trial court erred in admitting the testimony of the expert witnesses and in failing to base its conclusions solely on the viewing of the film" in the following language:

"In almost every field of the law, expert testimony is permitted on subjects concerning which the judge or administrator has no specialized competence. So here, the lower court properly received evidence to assist in the determination of contemporary community standards as well as the artistic merit and social importance of the film. [Citation.]"

In *People v. Williamson,* 207 Cal.App.2d 839, 846, in sustaining the right of the People to introduce expert testimony relating to community standards, this court adopted the language of Mr. Justice Frankfurter in his concurring opinion at page 165, in *Smith v. State of California,* 361 U.S. 147: "It bears repetition

that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' ".

In *In re Harris,* 56 Cal.2d 879, 880, our Supreme Court unqualifiedly held that it was a denial of due process for the trial court not to allow a defendant to prove contemporary community standards by means of "expert testimony, comparable writings and pictures adjudged in Los Angeles County to be not obscene, and comparable writings and publications purchased in the community."

Although ordinarily it might be regarded as too elementary to deserve specific comment, in the context of the instant appeal it appears appropriate to endorse appellant's observation that in this state the right to a jury trial is vested in the People as well as in the defendant. (Cal. Const., art. 1, § 7; *People v. Spencer,* 170 Cal.App.2d 145, 149, and cases cited.) Further, as noted in the Comments to the American Law Institute's Model Penal Code Tentative Draft No. 6, page 47: "Jury trial in this field [obscenity prosecutions] has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters."

Respondents are mistaken in asserting that the People stipulated to a submission of the case on the basis of the magazine alone. The record discloses that counsel entered into no such inappropriate stipulation. Counsel for the People stated only that he had no objection to

the trial court's looking at the magazine for the purpose of determining whether or not a triable issue was presented. He argued the valid contention that an examination of the magazine would demonstrate immediately and unquestionably the existence of a triable issue as to its obscenity. Manifestly he indicated no intention to waive the People's right to a jury trial or the right to produce all relevant evidence bearing upon the issues determinative of the guilt of the defendants.

The judgments of dismissal are reversed and the causes are remanded to the trial court for trial on the merits.

Herndon, *Acting P. J.*

We concur:

Fleming, *J.*

McCoy, *J. Pro Tem.**

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*Under assignment by the Chairman of the Judicial Council.

APPENDIX "C".

Pertinent Provisions of the First and Fourteenth Amendments to the Constitution of the United States.

Section 311 of the California Penal Code:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311.2 of the California Penal Code:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."